

This Opinion is Not a
Precedent of the TTAB

Mailed: October 14, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Citrus Club by Dewberry 334 Meeting Street, LLC

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Serial No. 87860519

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Andrew C. Stevens and Stephen M. Dorvee of Arnall Golden Gregory LLP
for Citrus Club by Dewberry 334 Meeting Street, LLC.

Taylor Duenas, Trademark Examining Attorney, Law Office 126,¹
Andrew Lawrence, Managing Attorney.

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Before Zervas, Wellington, and Lynch,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Citrus Club by Dewberry 334 Meeting Street, LLC (“Applicant”) seeks registration
on the Principal Register of the mark CITRUS CLUB in standard characters for

¹ The application originally was assigned to Examining Attorney Alexandra Portaro, and then re-assigned, on May 6, 2020, to Examining Attorney Taylor Duenas, who submitted a brief on behalf of the Office.

“cocktail lounge services” in International Class 43.² The word CLUB has been disclaimed.

The Examining Attorney refused registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on a likelihood of confusion with the following two registered marks, owned by the same entity:



and

CITRUS KITCHEN in standard character format.³

The cited registrations are for “restaurant services” in International Class 43 and contain a disclaimer of the word KITCHEN.

After the Examining Attorney made the refusal final, Applicant appealed. The appeal is fully briefed.

For the reasons set forth below, we affirm the refusal to register.

I. Likelihood of Confusion

Our determination of the issue of likelihood of confusion is based on an analysis of all the probative facts in evidence relevant to the factors set forth in *In re E. I. du*

² Application Serial No. 87860519, filed April 3, 2018, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s statement of its bona fide intent to use the mark in commerce.

³ Registration Nos. 5683098 and 56683099, respectively. Both issued on February 26, 2019. The composite word and design mark is described in the registration as consisting “of a circle bordered with small parallel lines with an image of half of an orange slice in the upper portion of the circle, the words CITRUS KITCHEN below, and a curved line symbol below the words CITRUS KITCHEN.”

Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973) (“*DuPont*”). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). We must consider each *DuPont* factor for which there is evidence and argument. See *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

In this proceeding, we focus our likelihood of confusion analysis on the Registrant’s cited standard character mark, CITRUS KITCHEN, vis-à-vis Applicant’s mark because this registered mark does not contain the design element which is a point of difference and the two cited marks cover the same “restaurant services.” In other words, if it is ultimately decided that there is no likelihood of confusion with this registered standard character mark, there is no need for us to consider the likelihood of confusion with the other word and design mark. See *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

A. The Services

In analyzing the second *DuPont* factor, we look to the identifications in the application and cited registration. See *Stone Lion Capital Partners v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). Indeed, “[t]he authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of [services] set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s [services], the particular channels of trade or the class of purchasers to which sales of the [services] are directed.” *Octocom Syst.*, 16 USPQ2d at 1787.

“[L]ikelihood of confusion can be found ‘if the respective [services] are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.’” *Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (internal citations omitted).

A “cocktail lounge” is defined as “a bar”⁴ and as “a public room (as in a hotel, club, or restaurant) where cocktails and other drinks are served.”⁵

The record and definitions cited above support a finding of a close and intrinsic relationship between cocktail lounges and restaurants. Specifically, the evidence shows that these services may be provided by the same entity at a hotel, and, as defined, a cocktail lounge may be within a restaurant. The Examining Attorney submitted Internet evidence showing 6 different entities advertising bar or cocktail lounge services, as well as restaurant services.⁶ For example, the Rosewood Mansion on Turtle Creek (providing “accommodation . . . dining . . .” in Texas) advertises itself as the location for “The Mansion Restaurant” and “The Mansion Bar,” with the latter touted as “the bar pays homage to its Texas heritage with Southern décor and a

⁴ We take judicial notice of the definition from Dictionary.com (www.dictionary.com), based on the RANDOM HOUSE UNABRIDGED DICTIONARY, Random House, Inc. (2020). The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

⁵ Definition from Merriam-Webster online dictionary (www.merriam-webster.com), based on MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, ELEVENTH EDITION.

⁶ Attached to Office Actions issued on February 28, 2019 and September 12, 2019.

vibrant ambiance of a refined private club.”⁷ The Mansion Bar provides “an elevated bar menu . . . ensuring that the beverages and cuisine offered thoughtfully complement one another.”⁸ Likewise, the Hotel Jerome website advertises two bars (the “Bad Harriet” and “J-Bar”), both of which feature “craft cocktails” or “vintage-inspired cocktails.”⁹ These two bars at the Hotel Jerome also provide restaurant services, offering “small plates” and “Aspen’s best burger.”¹⁰ One more example is from the “1 Hotel Brooklyn” website that advertises its own “Harriet’s Rooftop & Lounge” as an “old-fashioned cocktail lounge” with a bar “stocked with fresh and seasonal ingredients alongside some of the finest and approachable spirits.”¹¹ The 1 Hotel Brooklyn website also advertises its “farm-to-table cuisine . . . at our unique dining venues,” that include Harriet’s Rooftop & Lounge.¹²

The Examining Attorney also attached copies of more than 20 use-based, third-party registrations -- each registration covers cocktail lounge and restaurant services.¹³ These use-based registrations are probative because they show that the involved services are the type which may emanate from a single source under the same mark. *See In re RiseSmart, Inc.*, 104 USPQ2d 1931, 1934 (TTAB 2012) (citing *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993)).

⁷ Office Action dated February 28, 2019, at TSDR pp. 20-22.

⁸ *Id.* at 22.

⁹ *Id.* at 11-16.

¹⁰ *Id.* at 12.

¹¹ Office Action dated September 12, 2019, at TSDR pp. 9-26.

¹² *Id.* at 13-14.

¹³ *Id.* at 47-103.

In sum, in addition to an intrinsic relationship existing between these services based on cocktail lounges sometimes located within a restaurant and both services involving the provision of drinks within a sit-down establishment, the record sufficiently shows that these services may be offered at single physical location, e.g., a hotel, and offered by the same entity under the same mark. Our finding is also in line with previous determinations regarding the same services. *See, e.g., In re Jack B. Binion*, 93 USPQ2d 1531, 1535-36 (TTAB 2009) (bar services closely related to restaurant services).

Accordingly, the second *DuPont* factor weighs in favor of finding confusion likely.

B. The Trade Channels and Classes of Consumers

The evidence and dictionary definitions show that consumers may encounter cocktail lounges and restaurants in the same location, e.g., the cocktail lounge may be either within a restaurant or within the same hotel as a restaurant. In the latter example, both services may be advertised on the hotel's website. This demonstrates at least one common trade channel for these services. Moreover, cocktail lounge and restaurant services are offered to the same class of consumers, members of the public, at the same time or in the same evening. For example, patrons may have a pre-dinner drink at a cocktail lounge followed by dinner with drinks at a restaurant, and the likelihood of this scenario is compounded by convenience should the cocktail lounge be within the same hotel as the restaurant or even inside the restaurant itself.

Applicant relies on extrinsic evidence in arguing that the respective particular services of Applicant and Registrant cater to very different classes of consumers and

are geographically distant from one another. Specifically, Applicant argues that it uses its mark “in connection with a reservation-only rooftop cocktail lounge atop a five-star hotel in Charleston, South Carolina called The Dewberry.”¹⁴ Applicant goes on to describe its venue as a lounge that operates “exclusively in the evenings, employs a dress code, and prohibits children under the age of 21 from entering.”¹⁵ Applicant asserts that Registrant, in contrast, uses its mark “in connection with its sole store-front physical location in Rancho Cucamonga, California . . . focused on hand-crafted, healthy meal options . . . [and] is also open during the day, closes at 8:00 pm on Monday through Saturday, does not feature a dress code, and allows children.”¹⁶

Applicant’s arguments, or the evidence submitted in support, do not persuade us that the services, as they are described in the recitations of the application and cited registration, are different. Simply put, the limitations or restrictions on the types and ages of consumers, geographic location, hours of opening, etc. are not reflected in the identification of services in the application or cited registration, so the arguments based on such non-existing restrictions are not persuasive. We “have no authority to read any restrictions or limitation into the registrant’s description,” *In re I-Coat Co.*, 126 USPQ2d 1730, 1739 (TTAB 2018) (quoting *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1638 (TTAB 2009)), nor may Applicant “restrict [their] scope . . . by argument

¹⁴ 4 TTABVUE 11.

¹⁵ *Id.* at 12.

¹⁶ *Id.*

or extrinsic evidence.” *Id.* (citations omitted). Moreover, Applicant “seeks a geographically unrestricted registration under which it might expand throughout the United States,” *Giant Food, Inc. v. Nation’s Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 393 (Fed. Cir. 1983), and the cited registration is geographically unrestricted, which presumptively gives the registrant “the exclusive right to use its mark throughout the United States.” *Id.* See also *In re Appetito Provisions, Inc.*, 3 USPQ2d 1553, 1554 n.4 (TTAB 1987). Put differently, we must assume that Applicant’s and Registrant’s unrestricted recitations of services encompass exclusive and casual cocktail lounges and restaurants offered throughout the country, including in proximity to one another.

Accordingly, the third *DuPont* factor also weighs in favor of likely confusion.

C. Similarity of the Marks

We now compare the marks “in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *DuPont*, 177 USPQ at 567). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)). We assess not whether the marks can be distinguished in a side-by-side comparison, but rather whether their overall commercial impressions are so similar that confusion as to the source of the services offered under the respective

marks is likely to result. *Coach Servs.*, 101 USPQ2d at 1721; *see also Edom Labs. Inc. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012).

Here, we find Applicant's mark, CITRUS CLUB, and the registered mark, CITRUS KITCHEN, similar because both marks begin with the same term CITRUS followed by a single highly descriptive or generic term that has been disclaimed. The fact that CITRUS appears first makes the marks visually and aurally similar. CITRUS is also the more distinctive term of the marks and, as the initial element, is more likely to be noticed or remembered by consumers. *Palm Bay*, 73 USPQ2d at 1692 ("Veuve" is the most prominent part of the mark VEUVE CLICQUOT because "veuve" is the first word in the mark and the first word to appear on the label); *Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered").

In terms of the marks' connotations and commercial impressions, our analysis is based on a comparison of the entire marks, not just part of the marks. *Stone Lion Capital Partners*, 110 USPQ2d at 1161; *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). *See also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) ("It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion."). However, we note that the primary connotation of each mark is dictated by the initial, more distinctive term, CITRUS, rather than the marks' secondary terms, CLUB and KITCHEN. That is, because the

latter terms are descriptive, they have less source-identifying significance for purposes of distinguishing marks in likelihood of confusion determinations. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (“Regarding descriptive terms, this court has noted that the ‘descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.’”) (quoting *In re Nat’l Data*, 224 USPQ at 751). To the extent that the term CITRUS may be suggestive in the context of cocktail lounge and restaurant services, i.e., suggesting a citrus fruit ingredient in food or drinks being served, this same meaning would be conveyed by the two marks.

Ultimately, given the strong resemblance in sound and appearance due to the shared term CITRUS, as well as the marks’ overall similar connotations and commercial impressions, we find Applicant’s mark is similar to Registrant’s mark. Accordingly, this *DuPont* factor also weighs in favor of likely confusion.

D. Weakness of the Common Element CITRUS

“In determining the strength of a mark, we consider both its inherent strength based on the nature of the mark itself and its commercial strength, based on the marketplace recognition value of the mark.” *Am. Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d at 1028 (citing *Tea Board of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006) and MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:83 (4th ed. 2011) (“The first enquiry focuses on the inherent potential of the term at the time of its first use. The second evaluates the actual customer recognition value of the mark

at the time registration is sought or at the time the mark is asserted in litigation to prevent another's use.”)).

Applicant argues that “the terms in the cited registrations (CITRUS and KITCHEN) are quite common and weak terms, and therefore the cited registrations are entitled to a limited scope of protection.”¹⁷ In its brief, Applicant claims there are “nine registrations on the federal registry that feature the term CITRUS in Class 43,” and Applicant specifically identifies the following 4 registered and applied-for marks as relevant: CITRUS SITTERS (Reg. No. 5762166); CITRUS PEAR and design (Reg. No. 5572977); and POLLO TROPICAL CITRUS MARINATED CHICKEN and design (two marks subjects of Serial Nos. 87918239 and 87918227, that have been approved for publication).¹⁸ Applicant also asserts that “there are also thirty-two registrations on the federal registry that feature the term CITRUS in connection with food, restaurant, or bar services” and the fact that “these registrations coexist on the federal registry demonstrates that CITRUS is a weak term, and therefore, the cited registrations are entitled to a limited scope of protection.”¹⁹

Upon review of Applicant’s third-party registration evidence, we find Applicant’s characterization of the evidence is inaccurate and the evidence wholly inadequate for purposes of demonstrating a degree of weakness of the term CITRUS in connection with restaurant services. None of the third-party registrations for marks containing

¹⁷ 4 TTABVue 4.

¹⁸ Applicant submitted copies of third-party registrations and applications with its response filed August 15, 2019, at TSDR pp. 24-144.

¹⁹ *Id.* at 5.

CITRUS cover restaurant services. Indeed, approximately 20 of the registrations are for goods or services that are totally unrelated to restaurants, or the provision of food or drink, services. *See Omaha Steaks Int'l v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686 (Fed. Cir. 2018) (error to rely on third-party evidence of similar marks for dissimilar services, as Board must focus “on goods [or services] shown to be similar”); *In re i.am.symbolic, llc*, 123 USPQ2d at 1751 (disregarding third-party registrations for goods in other classes where the proffering party “has neither introduced evidence, nor provided adequate explanation to support a determination that the existence of IAM marks for goods in other classes, ... support a finding that registrants’ marks are weak with respect to the goods identified in their registrations”). For example, the registration for CITRUS SITTERS that Applicant specifically identifies in its brief is for “Child care; Child care services; Day-care centers; Nurseries and day care centers; Providing child care for children; Providing day care centers for children.” Other third-party registrations cover irrelevant goods and services, such as personal care products, insurance and education services, protective wax coatings, plant food, etc.

The CITRUS PEAR and design registration does involve “food preparation services featuring fresh, properly proportioned, healthy meals designed to fuel metabolism and burn fat,” but these are “made to order for delivery or pick up” and not served on location. With respect to the two approved applications for the POLLO TROPICAL CITRUS MARINATED CHICKEN marks, we note that CITRUS is used as part of descriptive phrase CITRUS MARINATED CHICKEN and has been

disclaimed. Regardless, third-party applications are evidence only of the fact that they have been filed, and have no probative value. *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1270 n.8 (TTAB 2009); *In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1365 n.7 (TTAB 2007). We note a handful of registrations cover food; however, the term CITRUS is also used descriptively in the marks and has been disclaimed, e.g., ICP INTERNATIONAL CITRUS & PRODUCE FAMILY OWNED (Reg. 4612085) for fresh fruit and vegetables, with a disclaimer of INTERNATIONAL CITRUS & PRODUCE and FAMILY OWNED.

There is also no evidence of record showing commercial use of any third-party marks that contain the term CITRUS.

In sum, although there may be a suggestive meaning to the term CITRUS in connection with cocktail lounge and restaurant services, as discussed supra, we do not find this term to be commercially weak or so inherently weak as to allow the registration of Applicant's mark. Accordingly, the *DuPont* factor regarding weakness is neutral in our likelihood of confusion analysis.

II. Conclusion

Because the marks are similar, and there is an intrinsic and demonstrated close relationship between Applicant's cocktail lounge services and Registrant's restaurant services, and these services may be found in the same channels of trade being offered to the same classes of consumers, we find that use of Applicant's mark CITRUS CLUB is likely to cause confusion with Registrant's mark CITRUS KITCHEN.

Decision: The refusal to register Applicant's mark is affirmed.